IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 36 of 1999

with

CRIMINAL APPEAL No 123 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

YUSUF KASAM

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 36 of 1999
   Mr.S.R.Divetia for Ms.R.V.Acharya, for Appellants.
   Ms.Hansa Punani, learned A.P.P. for Respondent.
2. Criminal Appeal No. 123 of 1999
   Ms.Hansa Punani, learned A.P.P. for Appellant.
   Mr.S.R.Divetia, learned advocate for Respondents.
   (amicus curiae).

CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 17/08/2004

COMMON ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE R.P.DHOLAKIA)

#. The criminal appeal no.36 of 1999 has been filed by the appellant-accused under Section 374(2) of the Criminal Procedure Code against the judgment and order of conviction and sentence passed on 15.12.1998 against the present appellants by the learned Additional Sessions Judge, Rajkot in Sessions Case No.89 of 1998 whereby the appellant no.1-Yusufbhai Kasambhai Majothi and appellant no.2-Parbatbhai Nagjibhai Bharvad were convicted under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as N.D.P.S.Act for short) and sentenced them to undergo simple imprisonment for 10 years and fine of Rs.1 lac, in default simple imprisonment for one year, whereas criminal appeal no.123 of 1999 is filed by the State for enhancement of sentence awarded. As both these appeals arise out of the common judgment, they are disposed of by this common judgment.

#. The brief facts of the case are as under :

On 26.4.1998, P.S.I. Shri B.V.Jani who was serving in Rajkot `B' Division Police Station received secret information from his informant that two persons viz. Yusufbhai Kasambhai Majothi wearing dark green colour pant and white shirt and Parbatbhai Nagjibhai Bharvad who was wearing cream colour pant and yellow designed shirt were having narcotic substance in their possession and were selling the same on the verandah of the Khodiyar Temple situated in Panjrapole area, Rajkot. On receiving the said information, he has reduced the same in writing and informed to his superior officer. In anticipation, he has also sent one yadi to F.S.L. persons to call them on the spot and instructed the Head Constable Nandgiri to call for two panchas. On arrival of panchas, he appraised them about the work and as they desired to work as panchas, thereafter primary panchanama has been prepared there and there. Thereafter, he along with panchas, F.S.L. Officer Shri Gameti, P.S.I. Shri Baranda and other police personnel went in Government vehicle and reaching the temple, they found the person there. They were informed by P.S.I. Shri Jani regarding

the information and also appraised them about their right of search and seizure before the Gazetted Officer/Magistrate orally as well as in writing to which the declined the same and permitted Shri Jani to search them. Therefore, first he searched Yusufbhai Kasambhai Majothi and during the search from the right side pant pocket, six small packets were found and on opening the same and examined by F.S.L. people and primarily it has been found as brown sugar. Thereafter, Shri Jani directed the Police Constable to call the goldsmith for weighing the same and accordingly Sureshbhai Durlabhjibhai Soni was called and on weighing the same, it was 300 gms. The same was packed in brown colour paper, panch slips were tied and sealed. On further search, Rs.200/- were found from his pocket and the same were also seized after completing all formalities. Thereafter, another person Parbatbhai Nagjibhai Bharvad was searched and on doing so, four small packets have been found from his shirt pocket and on opening the same it was opined by the F.S.L.people as brown sugar and it was weighed at 250gms. The same was also seized after completing all the formalities of seizure. On further search, Rs.100/- were found from him and same was also seized. After preparing the seizure memo, one copy of it was given to each accused. P.S.I.Shri Jani filed the complaint on behalf of the State against both the accused and same was sent to `B' Division Police Station, Rajkot along with the accused, muddammal, panchanama, seizure memo, F.S.L.report, certificate issued by weighing person Sureshbhai Durlabhjibhai Soni and on receiving the same, the complaint was registered as `B' Division Police Station, N.D.P.S. C.R.No.2/98 under Section 22 and 29 of the N.D.P.S.Act and thereafter they were arrested and sent in judicial custody and muddammal has been handed over to the P.S.O. and in turn it has been handed over to the Crime Writer Head to keep it in his custody till it has been sent to the F.S.L. for analysis.

#. Thereafter, at the end of investigation, chargesheet has been submitted by the I.O. and same has been registered as Sessions Case No.89/98 and as the accused appeared before the learned Additional Sessions Judge, Rajkot on 01.08.1998, charge was framed against them to which they denied and prayed for trial. Therefore, prosecution has led oral evidence of the following witnesses to prove the guilt against the present appellants-original accused :

(i) P.W.1 Bakulbhai Vitthalbhai Jani Exh.6 who was P.S.I.`B' Division Police Station at the relevant time and who is the complainant, (ii) P.W. 2 Mohammed Jamal

Exh.21, Panch of panchanama of search and seizure (hostile witness), (iii) P.W.3 Ajitbhai Laljibhai Gameti Exh.22, F.S.L. Officer who was there along with Police Officer and who analyzed the muddammal substance on the spot and issued certificate to that effect, (iv) P.W.4 Sureshbhai Durlabhjibhai Soni, Exh.24, weighing person who has weighed the muddammal on the spot and issued certificate to that effect, (v) P.W.5 Hitendrasinh Gajubha Jadeja Exh.25 member of the raiding party, Police Constable of `B' Division Police Station, Rajkot at the relevant time, (vi) P.W.6 Manubhai Janubhai Exh.26 P.S.O. `B' Division Police Station at the relevant time who registered the offence and also taken muddammal and accused in his custody and in turn handed over the muddammal to Crime Writer Head and on next date i.e.27.04.1998 he has sent the above referred muddammal to F.S.L. Junagadh, (vii) P.W.7 Sanjaykumar Arvindray Exh.31, Police Constable member of the raiding party, (viii) P.W.8 Ganpatprasad Banarasiprasad Exh.33 who was serving as A.S.I., `B' Division Police Station, Rajkot who was serving as Crime Writer Head and who received the muddammal of this case from P.S.O. Manubhai on 26.04.1998, (ix) P.W.9 Kalubhai Kasambhai Exh.36 who was second panch of panchanama of search and seizure (hostile), (x)P.W.10 Lakhmanbhai Mohanbhai Exh.37 and (xi) P.W.11 Dosumiya Sirajuddin Saiyed Exh.39, Investigating Officer. The prosecution has also placed reliance on the documentary evidence and thereafter on submission of the closing pursis, the learned Additional Sessions Judge recorded the further statement of the accused under Section 313 of the Criminal Procedure Code and after noting down the same and as the accused chose not to give evidence on oath and not to examine any witness in their support, after hearing the learned counsel for the respective parties, the judgment and order dated 15.12.1998 was passed and both the accused were convicted as stated above, which has given rise to this appeal.

#. Heard learned counsel Mr.Divetia learned counsel for the appellants and Ms.Hansa Punani, learned A.P.P. for the State in Criminal Appeal No.36 of 1999 and Ms.Hansa Punani, learned A.P.P. for the appellant and Mr.Divetia learned counsel appearing as amicus curiae for the respondents-original accused.

#. Mr.Divetia, learned counsel has mainly contended that it is a case of breach of Section 50 of the N.D.P.S.Act for which he took us through the oral evidence of P.S.I. Shri Jani and other persons who accompanied him in the raid along with the documentary evidence wherein

P.S.I.Shri Jani has informed the appellants-accused regarding their right of search and seizure before the Executive Magistrate/Gazetted Officer and submitted that the question which has been asked by P.S.I.Shri Jani is not in proper words and only to ask the willingness of accused to being searched and seizure before the Gazetted Officer/Magistrate will not be sufficient as per Sec.50 for which has also placed reliance upon the judgments in cases of Vinod V/s State of Maharashtra reported in 2003 SCC (Cri) 14 and K.Mohanan V/s State of Kerala reported in 2000 SCC (Cri) 1228.

#. Ms.Punani, learned A.P.P. has also taken us through the relevant evidence on that aspect and also placed reliance in the decision in case of Bhupatji Shakaraji V/s State of Gujarat reported in 2003(2) G.L.R. 1127, more particularly para 13 of the judgment. It has been argued by her at length that the judgment upon which the reliance has been placed by the learned counsel for the appellant has been dealt with in this judgment by the Full Bench of this Court.

#. In view of the above, we have gone through the Exhs.12 & 13 wherein P.S.I.Shri Jani has informed the accused regarding their right of search and seizure before the Gazetted Officer/Magistrate in writing along with the evidence of Shri Jani and other Police Personnel and other documentary evidence which clearly show that before doing the search and seizure of the appellant-accused, P.S.I. Shri Jani has taken sufficient care and he has complied with the provisions of Section 50 of the N.D.P.S.Act in toto in a true spirit. In these circumstances, we are unable to accept the contention raised by the learned counsel for the appellants that Section 50 is not complied with. Once, we come to the conclusion on the basis of fact that it has been fully complied with, it cannot be said that there is breach of Section 50. Learned counsel has not raised any other contentions, then also we have gone through the evidence on record which shows that P.S.I.Shri Jani has received secret information through his informant and on receiving the same it has been reduced in writing and informed his superior officers and thereafter called for the panchas and on appraising the panchas of the work and on their agreeing to it, he prepared the primary panchanama and to that effect panchanama was prepared in the police station itself and entry to the effect in the station diary was made. He also called Shri Gameti from the F.S.L. and they all went in the Government Vehicle on the spot wherein the accused were intercepted and after following all primary procedure viz. informing them regarding

their right of search and seizure before the Magistrate/ Gazetted Officer orally as well as in writing, their search was made and muddamal contraband article brown sugar was found in their possession and as they were not having licence or permit to keep the same, the same was seized after following required procedure and seizure memo has been given to them. Thereafter, complaint to that effect was given by P.S.I.Jani on behalf of the Government and accused were arrested and arrest memo was also given to them and their relatives were also informed in writing regarding their arrest. Thereafter, accused, muddammal, panchanama, FIR, search and seizure memo and certificate issued by F.S.L. Officer Shri Gameti and weighing person Shri Soni were sent to `B' Division Police Station, Rajkot and P.S.I. registered the offence and also taken the custody of muddammal and accused. In turn he had handed over the muddammal to the Crime Write Head and thereafter the accused were produced before the concerned Court and the muddammal was sent to F.S.L. and on arrival of the report and at the end of investigation, chargesheet was submitted. As per the F.S.L. report, the muddammal which has been seized from the accused was contraband article brown sugar and there is evidence on record which proves beyond reasonable doubt that muddammal which has been seized from the accused has been sent in tact condition to the F.S.L. and same has been analyzed by the F.S.L. and found to be brown sugar. There is evidence on record which satisfies the conscious of the Court that the muddammal which has been seized from the accused has been handed over to the P.S.O. immediately and in turn it has been handed over to the Crime Writer Head and it has been sent to the F.S.L. at the earliest and nothing otherwise has come out from the cross-examination.

#. In these circumstances, the criminal appeal no.36 of 1999 filed by the appellants deserves to be dismissed and is dismissed accordingly.

#. As far as criminal appeal no.123 of 1999 filed by the State for enhancement of punishment, we have gone through the same and we are of the view that looking to the fact of quantity of muddammal seized, sentence which has awarded by the court below is just and proper and therefore we are not inclined to interfere with the same. Therefore, this appeal deserves to be dismissed and it is dismissed accordingly.

(R.P.DHOLAKIA, J)

(SHARAD D DAVE, J)

srilatha